



**STATE OF NEW JERSEY**

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of Michael Kinsley,  
County Correctional Police  
Lieutenant (PC2913W), Atlantic  
County

Bypass Appeal

CSC Docket No. 2021-370

**ISSUED: APRIL 12, 2021 (HS)**

Michael Kinsley, represented by Carl N. Tripician, Esq., appeals the bypass of his name on the County Correctional Police Lieutenant (PC2913W), Atlantic County eligible list.

The appellant appeared as the first ranked non-veteran eligible on the subject eligible list, which promulgated on December 5, 2019 and expires on December 4, 2022. A certification, consisting of the names of three eligibles, was issued on July 22, 2020 (PL200682) with the appellant listed in the first position. In disposing of the certification, Atlantic County (County) bypassed the appellant and appointed M.M., the second listed eligible, effective September 20, 2020. The third listed eligible was retained.

On appeal to the Civil Service Commission (Commission), the appellant states that he has now been the first ranked eligible on two consecutive County Correctional Police Lieutenant (Lieutenant) lists.

In response, the County, represented by Jennifer P. Starr, Assistant County Counsel, states that the Lieutenant rank serves as the Shift Commander and is responsible for the administration and monitoring of all activities that take place during the shift. The Lieutenant directly supervises all subordinate staff; schedules staff workloads; reviews work performance; and assists with challenging assignments or inmates. The County also states that in many instances, the Lieutenant is the highest-ranking member on duty and needs to be able to adequately direct any emergency response. The County indicates that M.M. was promoted to the

supervisory title of County Correctional Police Sergeant (Sergeant) on July 26, 2015. In his years as Sergeant prior to his promotion to Lieutenant, M.M. received a one-day suspension and five reprimands.<sup>1</sup> The appellant was promoted to Sergeant on August 10, 2014. In his years as Sergeant prior to M.M.'s promotion to Lieutenant, the appellant received a 30-day suspension by settlement; a three-day suspension; a one-day suspension; and 11 reprimands.<sup>2</sup> The County maintains that M.M. did not have the supervisory and performance issues that the appellant had. The County states that M.M., who had no major discipline in his history, was promoted after considering the candidates' disciplinary history, performance, qualifications, and experience. It also states that M.M. demonstrated good decision-making as a supervisor and set a proper example in "leadership, discretion, initiative, diligence, truthfulness, courage, and attention to duty." In support, the County submits the appellant's and M.M.'s respective disciplinary history reports<sup>3</sup> and the certified statement of the Warden of the Atlantic County Justice Facility (Warden), who was charged with selection for promotion.

In reply, the appellant argues that because his last bypass was also based on his disciplinary history, it defies logic that the County again relies on his disciplinary history to bypass him here. In this regard, he claims that he has shown great improvement since the last bypass, yet the County continues to point to old issues. He contends that if only the years 2019 and 2020 are considered, there is not a significant difference in the *recent* disciplinary histories of the two candidates to justify acceptance of this as a non-pretextual justification for the bypass.<sup>4</sup> The appellant argues that the County did not explain how M.M. demonstrated the qualities of "discretion, initiative, diligence, truthfulness, courage, and attention to duty" and did not provide instances wherein he failed to do the same. Thus, he asserts, one is left to assume that cronyism, favoritism, or animus is what really underlies the bypass. In support, the appellant submits, among other documents, his certified statement.

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<sup>1</sup> M.M. began employment with the County on September 29, 2008. From that date to his appointment to Sergeant, M.M. received three reprimands.

<sup>2</sup> These disciplinary actions were for incidents dated July 1, 2016 or later. Two of the reprimands and the one-day suspension were for incidents dated after the appellant was last bypassed for Lieutenant, in January 2019. *See In the Matter of Michael Kinsley, County Correction Lieutenant (PC2540T), Atlantic County* (CSC, decided July 31, 2019). It is further noted that the appellant began employment with the County on September 19, 2005. From that date to his appointment to Sergeant, the appellant received two one-day suspensions and five reprimands.

<sup>3</sup> The reports include incidents where the actions ultimately taken were counseling or remediation. However, the Commission does not consider such actions to be disciplinary in nature. *See N.J.A.C. 4A:2-2.2(a)* (major discipline includes removal, demotion, and suspension or fine for more than five working days at any one time) and *N.J.A.C. 4A:2-3.1(a)* (minor discipline is a formal written reprimand or a suspension or fine of five working days or less).

<sup>4</sup> In the 2019-2020 timeframe, M.M. received one reprimand, and the appellant received two reprimands and a one-day suspension.

In reply, the County maintains that it has made clear that the appellant was bypassed due to his supervisory and performance issues, as evidenced by his disciplinary history. It asserts that the appellant does not dispute his disciplinary history, and he insinuates that because he has fewer disciplines since his last bypass, this is no longer a valid basis for bypassing him. The County counters that the standard is not whether a candidate has improved since his last bypass. Rather, selection for an open position is determined by selecting the most qualified candidate who is best suited for the open position, and a short period without disciplinary infractions does not make the appellant's history irrelevant. The County argues that it is not just the number of disciplines that matter but also the nature of the underlying conduct. In this regard, the County highlights that the appellant, while a Sergeant, received a 30-day suspension, by settlement, for actions that showed a lack of judgment, poor conduct, and untruthfulness. Even after his last bypass for Lieutenant, in January 2019, the appellant received two reprimands and a one-day suspension. The County maintains that M.M. had a far less extensive disciplinary record without any major disciplines. In support, the County submits the Warden's second certified statement.

In reply, the appellant notes that in his December 5, 2020 Performance Report, the appellant's direct supervisor, Lieutenant L.W., stated that the appellant was an "outstanding supervisor, who is ready for the next level." In support, he submits a second certified statement.

## CONCLUSION

*N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. Moreover, it is noted that the appellant has the burden of proof in this matter. *See N.J.A.C.* 4A:2-1.4(c).

Since the appellant, a non-veteran, was listed in the first position on the certification, it was within the County's discretion to select any of the top three interested eligibles on the certification. The County justifies its decision to bypass the appellant and appoint M.M. on the basis of the appellant's disciplinary record while serving as a Sergeant. It is well established that disciplinary actions may be considered in bypassing an individual for appointment. *See In the Matter of Paul DeMarco* (MSB, decided April 6, 2005) (Appellant's disciplinary action can be considered in determining whether he could be bypassed from the subject list). An appointing authority has the discretion to dispose of a certification within the guidelines of Title 11A of the New Jersey Statutes Annotated and Title 4A of the New Jersey Administrative Code. This discretion includes utilizing each candidate's history and qualifications to determine the best candidate from a list of three eligibles, any of whom may be selected under *N.J.A.C.* 4A:4-4.8(a)3.

The appellant does not dispute his disciplinary history but contends that the County should have been limited to a consideration of his disciplinary record since his last bypass. The appellant, however, offers no authority for such a proposition, and the Commission cannot endorse such a restriction on an appointing authority's discretion. Lieutenant is a supervisory title. Thus, the Commission can understand why the County based its selection on the candidates' disciplinary records while they served as Sergeants: Sergeant is the next lower in-series title, and it is likewise a supervisory title. The appointing authority's determination that the appellant's disciplinary record while serving as a Sergeant was worse than M.M.'s at the time the eligibles were being considered for the appointment at issue was not unreasonable. In this regard, M.M.'s record included a one-day suspension and five reprimands, none of which is considered major discipline. The appellant's record included 11 reprimands; a three-day suspension; a one-day suspension; and major discipline in the form of a 30-day suspension.<sup>5</sup>

The appellant claims that cronyism, favoritism, or animus must have been at play because the County did not provide examples of how the candidates did or did not demonstrate the qualities of discretion, initiative, diligence, truthfulness, courage, and attention to duty. However, the Commission will not simply "assume" the presence of such nefarious motives, given the lack of any additional support for the appellant's claim and the eligibles' disciplinary histories, which *are* well-documented in the record. In addition, that the appellant's supervisor apparently endorsed his promotion is not dispositive. While the appellant's supervisor, a Lieutenant, can make hiring recommendations, he is not the appointing authority.

It must be noted that the County had selection discretion under the "Rule of Three" to appoint a lower-ranked eligible absent any *unlawful* motive. See *N.J.A.C. 4A:4-4.8(a)3*; *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 *N.J.* 38, 49 (2011). Compare, *In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984) (Hearing granted for individual who alleged that bypass was due to anti-union animus); *Kiss v. Department of Community Affairs*, 171 *N.J. Super.* 193 (App. Div. 1979) (Individual who alleged that bypass was due to sex discrimination afforded a hearing). Moreover, the appellant does not possess a vested property interest in the position. In this regard, the only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. See *Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990). The appellant has not presented any substantive evidence regarding his bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the County's discretion under the "Rule of Three." Moreover, the County presented a legitimate reason for the appellant's bypass that

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<sup>5</sup> Even assuming the appellant's preferred timeframe, 2019-2020, were to be used, he had the worse disciplinary record. In this regard, the appellant received two reprimands and a one-day suspension compared to M.M.'s one reprimand.

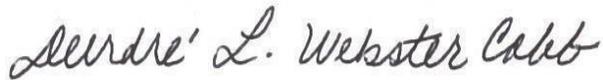
has not been persuasively refuted. Accordingly, a review of the record indicates that the County's bypass of the appellant's name was proper, and the appellant has not met his burden of proof in this matter.

**ORDER**

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 7<sup>TH</sup> DAY OF APRIL, 2021



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